

IN THE SUPREME COURT OF IOWA

NO. 17-0468

IOWA DEPARTMENT OF ECONOMIC DEVELOPMENT,

Appellant,

vs.

**GHOST PLAYER, LLC, and
CH INVESTORS, LLC,**

Appellees.

**APPEAL FROM THE DISTRICT COURT OF POLK COUNTY
HONORABLE MICHAEL D. HUPPERT, JUDGE**

**APPELLANT IOWA DEPARTMENT OF ECONOMIC
DEVELOPMENT'S FINAL REPLY BRIEF**

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STATEMENT OF ISSUES

I. Res Judicata does not Foreclose the Agency's Exercise of its Clear Authority to Revoke Tax Credits Issued to a Party Upon Discovering that Party Made False Representations in its Tax Credit Application.

Authorities

Iowa Code § 17A.19(10)(f)

Iowa Code §17A.19(10)(b)&(d)

Iowa Code §17A.19(8)(a)

Iowa R. Civ. Proc. 1.1013(3)

Pavone Kirke, 807 N.W.2d 828 (Iowa 2011)

Bennett v. MC No. 619, Inc., 586 N.W.2d 512 (Iowa 1998)

Restatement (Second) Judgments § 83 cmt. b

Buechel v. Five Star Quality Care, Inc., 745 N.W.2d 732 (Iowa 2008)

II. THE LACK OF AUTHORITY ISSUE IS INSEPARABLE FROM THE RES JUDICATA ANALYSIS

Authorities

Bennett v. MC # 619, 586 N.W.2d 512 (Iowa 1998)

Des Moines Police Dep't v. Iowa Civ. Rights Comm'n, 343 N.W.2d 836 (Iowa 1984)

Walker v. Iowa Dep't of Job Serv., 351 N.W.2d 802 (Iowa 1984)

370 Iowa Admin Code R. 4.7(1)(d)(1)

261 Iowa Admin. Code R. 36.5(2)

Pavone Kirke, 807 N.W.2d 828 (Iowa 2011)

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Iowa Code Ch. 15.393

261 Iowa Admin. Code R. 261-36

Iowa Code §17A

Iowa Code § 17A.19

REPLY ARGUMENT

Ghost Player has not even bothered to assert that the Agency's decision, concluding that Ghost Player breached its contract with the Agency by submitting fabricated documents together with false statements in an apparently deliberate effort to defraud the taxpayers of Iowa, "is not supported by substantial evidence in the record." *See* Iowa Code § 17A.19(10)(f) (setting forth the standard for overturning an agency decision on the facts). Instead Ghost Player chose to rest its petition solely on its legal claim that the Agency's decision, however well factually supported, is beyond the Agency's authority because the Agency had previously issued a decision awarding tax credits to Ghost Player. Accordingly, Ghost Player can prevail here only if it has met *its burden* of demonstrating that some form of preclusion rendered the Agency's decision "beyond the authority delegated to the agency" or otherwise "prohibited by law." *See* Iowa Code §17A.19(10)(b)&(d) (the only bases asserted by Ghost Player for overturning the Agency's actions); Iowa Code §17A.19(8)(a) ("The burden of demonstrating the required prejudice and invalidity of agency action is on the party asserting invalidity"). Ghost Player has not done so.

I. THE ELEMENTS OF RES JUDICATA HAVE NOT BEEN MET

In order for res judicata to apply, Ghost Player must prove all the elements of res judicata.¹ Ghost Player has proven none of the elements.

A. The parties are not the same

Ghost Player's brief makes no answer to the point that the Agency was not even a party when it made its initial determination. It was a decision-maker. Ghost Player appears to recognize this when it analogizes the Agency to a judge vacating his own decision. Appellee's Proof Brief, at 11. Respectfully, Ghost Player can't have it both ways. Either the Agency was like a judge when it made its tax credit decision, in which case a judge is not a party appearing before himself, or the Agency was like a party, in which case Ghost Player's analogy does not make sense.² Since the Agency

¹ An adjudication in a prior action between the same parties on the same claim is final where: (1) the parties in the first and second action are the same parties or parties in privity, (2) there was a final judgment on the merits in the first action, and (3) the claim in the second suit could have been fully and fairly adjudicated in the prior case (i.e., both suits involve the same cause of action). *Pavone Kirke*, 807 N.W.2d 828, 836 (Iowa 2011) (citations omitted); *see also Bennett*, 586 N.W.2d at 516-17.

² This analogy also fails because the Agency is not in fact vacating a prior decision. Rather it is rendering a new decision based on a newly discovered breach of contract. Also, as discussed more *infra*, the original decision was not made in the context of court-like proceedings, and thus there is no quasi-judicial "final judgment" to vacate. Finally, even if Rule 1.1012 does apply, it explicitly allows a prior final judgment to be vacated based on, *inter alia*, "irregularity or *fraud* in obtaining it." Iowa R. Civ. Proc. 1.1012(3) (emphasis added).

was not a party when it made its tax credit determination, the parties (plural) to the present action are different than the party (singular), or more properly applicant, in the original tax credit application process.

B. There was no previous Final Adjudicatory Decision

Other than merely asserting that the February 2012 decision constitutes “final agency action,” Ghost Player offers no analysis or authority as to how that decision constitutes a final adjudicatory action. *See* Appellee’s Proof Brief, at 14. The law is clear. In order for res judicata to apply in the context of an agency decision there must be not only a final agency action, but a “final adjudicatory decision.” *Bennett v. MC No. 619, Inc.*, 586 N.W.2d 512, 517-18 (Iowa 1998). In the context of an agency action, a final adjudicatory decision occurs where the agency “is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by the courts . . .” *Id.* at 517 (quoting Restatement (Second) Judgments § 83 cmt. b). Ghost Player makes no effort to explain how an application for tax credits, where the only party is the applicant, and without any hearings or other court-like proceedings, can qualify as an adjudicatory action.

Similarly, Ghost Player makes no answer to the point that an agency decision, subject to a statutory right of review by a judicial decision-maker,

is not in any genuine sense “final.” *See* Appellee’s Proof Brief, at 13-16.

Nor does Ghost Player address the point that it is only on judicial review that this case, for the first time, was subject to adjudicatory procedures in which the Agency and Ghost Player both appeared as parties. *See* Appellee’s Proof Brief, at 13-16.

Again Ghost Player wants it both ways. It wants the original Agency tax credit decision to be truly final—settled for all time—*except for* its own ability to claim the number should be revised upwards because the agency supposedly got it wrong about in-kind agreements. In order for Ghost Player to be able to argue that the initial award should be revised upwards, one of the following has to be true: either (1) the original decision awarding tax credits involved an entirely separate claim from any subsequent decision regarding the consequences of Ghost Player’s alleged in-kind agreements,³ or (2) the decision on the initial tax credit claim was not final and remained open to subsequent review based on, *inter alia*, Ghost Player’s alleged in-kind agreements. Either way, the Agency is permitted to consider the facts and law surrounding the alleged in-kind agreements, *which Ghost Player has asked the Agency to consider*, and apply the consequences that flow from them.

³ In that case it would fail the basic threshold of involving adjudication “on the same claim.” *Bennett*, 586 N.W.2d at 517.

The decision to award credits was neither final nor adjudicatory.

C. There was no previous full and fair opportunity for the Agency to address the fraud issue.

Ghost Player doubles down on its assertion that there was a full and fair opportunity to litigate the fraudulent misrepresentations issue solely because it was possible to “discover” these misrepresentations back when the Agency was reviewing Ghost Player’s tax credit application. Appellee’s Proof Brief, at 15. Essentially, Ghost Player argues for something akin to the discovery rule applicable in statute of limitations cases. *See Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 736 (Iowa 2008) (holding that a party is placed on inquiry notice when it “in the exercise of reasonable care should have discovered all the elements of the action.”) (internal quotation omitted). The twist is under Ghost Player’s novel theory, it is claim preclusion—not a limitations period—that attaches as soon as a party exercising reasonable care should have discovered all the elements of a claim. While an interesting theory, Ghost Player was apparently unable to find any cases where an Iowa court has so held. The Agency too has searched in vain for such authority.

Even if the Court were inclined to impose something akin to an inquiry notice standard in this context, the simple point remains that at the time of the initial tax credit determination there was no reason why the

Agency, exercising reasonable care, should have discovered Ghost Player's misrepresentations with regards to in-kind claims. As the Agency has repeatedly pointed out, and Ghost Player has not denied, the disallowance of in-kind claims in 2012 was based on the categorical legal conclusion that in-kind claims are not qualified expenditures or payments within the meaning of the applicable statute. (Non-Qualified Description, R. at 1303, App. 845, 2012 Decision, R. 1340, App. 854). Thus there was no reason at that point to inquire after the factual validity of claims that were disallowed as a matter of law. To the extent Ghost Player suggests that the Agency had some obligation to affirmatively vet every single document, relevant or not, that was submitted to it, there is nothing in the applicable statutes or regulations that impose such a duty, nor is that reasonable as a matter of equity.

Agencies should be permitted to make reasonable choices about where best to employ their limited resources and choosing not to investigate in-kind agreements that were already disallowed as a matter of law is certainly a reasonable choice.

This brings us back to the question of whether the Agency previously had a full and fair opportunity to exercise its breach of contract rights flowing from Ghost Player's submission of fraudulent documents. The answer is no. It can hardly be said that a party (if the Agency even was a

party) had a full and fair opportunity to litigate a claim it didn't know it had when the previous decision was made. The notice of default and subsequent Agency decision declaring default and imposing contractual remedies was the first and only opportunity the Agency has had to adjudicate this claim.

D. The contractual scheme of remedies can and should be considered as further proof that the elements of res judicata have not been met.

Ghost Player does not even bother to dispute that the regulations and contract entered into and agreed to by Ghost Player clearly contemplated that the Agency would have a right to impose remedies based on subsequent breaches of contract. Instead it merely argues that the Agency failed to preserve error. While it is true that the Agency did not use the magic words “scheme of remedies” below, it certainly raised the fact that the contract and administrative rules in effect at the time contemplated that the agency could assert, notice, and impose specified remedies for breaches of contract. (Respondent’s Brief, at 11-13, App. 131-133). Moreover, Ghost Player concedes the Agency properly preserved error on the issues of legal authority, res judicata and claim preclusion.⁴ (Appellee’s Proof Brief, at 8, 13). Thus even if the Court concludes the Agency failed to preserve error on scheme of remedies as an *exception to res judicata*, it nevertheless remains

⁴ As noted supra, the Agency disputes these issues are separate, but even as conceived of by Ghost Player the Agency has concededly preserved error.

that the contractual / regulatory scheme impacts the analysis of finality and previous opportunity to fully and fairly litigate as *part of* the res judicata analysis.

- i. The contractual / regulatory framework is additional evidence the original tax credit decision was not “final.”

Since the contractual scheme contemplated that there could be breaches of contract, with no indication that this right is cut off after the initial tax credit determination, it is therefore even more clear that the tax credit determination was never intended to be final in the sense of precluding remedies for subsequent breaches of contract. (*See Contract, Article 10, App. 47-48*). The regulatory and contractual regime always contemplated that, “[i]f the default remains uncured, the Recipient is required to repay all or a portion of the tax credit benefits received.” (*Contract, 10.3, App. 48*). Ghost Player has not denied this, and yet they argue for treating the tax credit determination as, effectively, a final decision that there will never be any breaches of contract. This flies in the face of the express language of the contract entered into pursuant to the regulatory regime governing the issuance of these tax credits.

- ii. The contractual / regulatory framework is additional evidence there was not a previous opportunity to fully & fairly adjudicate.

Considered in the context of the contractual remedies provisions, Ghost Player's position that there was a full and fair opportunity to litigate becomes even more untenable. This is because it requires the Court to conclude that by rendering a tax credit determination the Agency should have understood it was preemptively waiving all breaches of contract that might subsequently arise, or at least that it might have previously discovered. Since the contractual / regulatory scheme that existed at the time of the decision clearly contemplated that the Agency could subsequently notice and seek remedies for breaches of contract, there is no reason anyone in the Agency's position should have understood that they needed to preemptively investigate all possible future breaches of contract before issuing a decision. This includes any breaches hidden within the documents Ghost Player had already submitted. The Agency would have reasonably concluded that if new breaches of contract ever came to light they could raise them as new and separate claims on subsequent occasions, limited only by any applicable statutes of limitation on breaches of contract.⁵

The Agency, reasonably considering the facts and law as it existed at the time, was not on inquiry notice that it needed to raise all future breaches of contract before issuing a decision. Thus, it is not only the case that the

⁵ Ghost Player has at no point asserted the statute of limitations has run in this matter.

Agency had no reason to be aware of the facts giving rise to this particular breach, it also had no reason to be aware that it was expected to investigate all possible breaches prior to issuing a decision. The Agency has had no prior opportunity to fully and fairly litigate the breach of contract claim arising from Ghost Player's misrepresentations.

II. THE LACK OF AUTHORITY ISSUE IS INSEPARABLE FROM THE RES JUDICATA ANALYSIS

Ghost Player attempts to separate out its “without legal authority to collaterally attack” argument from its res judicata argument as though they were two separate issues. They are not. The reason why an agency, under certain circumstances, lacks authority or is prohibited from engaging in subsequent review of a previously issued final adjudicatory decision is res judicata. This is the basis of the district court's decision. In holding that a final decision of an agency is not subject to collateral attack in a subsequent matter, the district court quoted this Court, “we have held that the *final adjudicatory decision* of an administrative agency . . . *is entitled to res judicata effect as if it were a judgment of a court.*” (Ruling, at 6, App. 986 (quoting *Bennett v. MC # 619*, 586 N.W.2d 512, 517-18 (Iowa 1998) (emphasis added)).

Even the cases cited by Ghost Player are consistent with the notion that any “lack of authority” to engage in subsequent review of final Agency

actions should be analyzed according to the elements of res judicata. In *Des Moines Police Dep't v. Iowa Civ. Rights Comm'n*, the Court held that an agency lacked authority to revisit the same claim after it became final. 343 N.W.2d 836, 838-839 (Iowa 1984). This is not separate principle from res judicata, but an articulation of it. In a case that involved two parties,⁶ *in addition to the deciding agency*, appearing in quasi-adjudicative proceedings in front of the Iowa Civil Rights Commission, the commission's final adjudicative decision became final (i.e. subject to res judicata) after the case was dismissed on judicial review. 343 N.W.2d 836, 839 (Iowa 1984) (holding "a final adjudicatory decision of an administrative agency such as the Commission is entitled to res judicata effect as if it were a judgment of the court"). The applicant was precluded from bringing a new claim not because there was any dispute about the application of res judicata, but because the court concluded that the original finding of discrimination was separate from a subsequent enforcement claim for damages based on that previous finding, and the second claim was time barred for failure to file within 120 days after the allegedly discriminatory action as required by the Iowa Civil Rights Act. *Id.* at 839-840. Thus to the extent this case illustrates any separate lack of authority issue, it is only that agencies' lack the

⁶ The parties were an applicant for a patrol officer position alleging gender discrimination, and the Des Moines Police Department.

authority to consider claims not brought within the applicable limitations periods, which is not an issue in the present matter.

Ghost Player's reliance on *Walker* is similarly misguided. In *Walker* the Court actually held that Iowa Dep't of Job Services did have authority to revoke previously issued benefits based on newly discovered facts. *Walker v. Iowa Dep't of Job Serv.*, 351 N.W.2d 802, 805 (Iowa 1984). This was because the applicable regulations provided that the agency's decision was final "*unless* there are newly discovered facts which affect the validity of the original determination." *Id.* (citing 370 Iowa Admin Code § 4.7(1)(d)(1)) (emphasis added). This is analogous to the present situation, where the applicable regulations gave the Agency authority to enter a contract with "repayment requirements or other penalties," without time limitation (beyond generally applicable statutes of limitation). 261 Iowa Adm. Code 36.5(2) (Oct 8, 2008), R. 1372, App. 861. Essentially, the existence of non-time-limited contractual remedies means that an Agency's decision is final *unless* there are newly discovered facts constituting a breach of contract. In both *Walker* and the present dispute, the decision, at least as it applied to newly discovered facts / breaches, was not truly a "final judgment on the merits," and/or involved a different claim, either of which would be fatal to

the application of res judicata. *See Kirke*, 807 N.W.2d 828, 836 (stating the res judicata elements).

Otherwise, the cases cited by Ghost Player stand for nothing more than the elementary proposition that a party must timely appeal in order to preserve its right to challenge a decision. The *Walker* Court also held that claim preclusion applied against the applicant because he failed to timely appeal the decision revoking his benefits within the applicable appeal period, at which point it became final. *Walker*, 351 N.W.2d at 805. Similarly, in *Toomer* and *Shelley*, the courts held that a decision becomes final against a party when it fails to timely appeal an agency's decision. *Toomer v. Iowa Dep't of Job Serv.*, 351 N.W.2d 594, 598 (Iowa 1983); *Shelley ex rel. Iowa Dept. of Natural Resources v. Shelley*, 512 N.W.2d 579, 581 (Iowa Ct. App. 1993). A claim is deemed final against a party that fails to timely appeal an agency decision *as part of* the claim preclusion analysis. *See Toomer*, 351 N.W.2d at 598 (after failure to timely appeal, plaintiffs "are precluded, by the doctrine of claim preclusion (res judicata) from collaterally attacking the agency's final decision"); *Shelley*, 512 N.W. at 581 ("Shelleys' claims are barred by the doctrine of claim preclusion" because they failed to timely

appeal).⁷ Again, there is no separate finality / lack of authority issue; rather finality is analyzed as a component of the standard res judicata analysis.

Even if there were some affirmative requirement to demonstrate authority outside the res judicata framework, the existence of the contract entered into explicitly pursuant to regulation provides that authority. Ghost Player admits that “[t]he Agency undoubtedly had authority to initially determine whether Ghost Player was eligible for tax credits and the appropriate amount of tax credits to award the Petitioners -- based on Iowa Code Chapter 15.393, Iowa Administrative Code 261-36, and the contract between Ghost Player and the Agency.” Appellee’s Proof Brief, at 11-12. The applicable rules expressly authorized, and indeed mandated that “department *shall* prepare a contract, which includes . . . terms and conditions for receipt of tax credit benefits; *and repayment requirements or other penalties* imposed in the event the recipient does not fulfill its obligations as described in the contract.” 261 Iowa Adm. Code 36.5(2) (Oct

⁷ To the extent Ghost Player is attempting to argue that the Agency should have appealed the original tax credit decision, this again ignores the role of the agency as a decision-maker—not a party—in the original process. It is the equivalent of arguing that a judge must file an appeal to his own decision. There is nothing in Iowa Code 17A or other applicable law that permits an agency to seek to review of its own decision. *See* Iowa Code § 17A.19 (permitting a person or party “aggrieved or adversely affected by an agency action” to seek relief from the courts, but providing no mechanism for an agency to seek review of its own decision).

8, 2008) (emphasis added), R. 1372, App. 861). The Contract included certain representations, the violation of which would constitute breach of contract, and among those was the representation by Ghost Player that its application “does not contain any untrue or misleading statements of material fact.” Contract, 8.4, App. 45. The Contract provides authority to declare an event of default if any representation or warranty made by Ghost Player, or statement or certificate furnished pursuant to contract, proves materially untrue. Contract, 10.1(c), App. 48. The Contract provides authority to notice default and to require repayment of tax credit benefits received if the default is not cured. Contract, 10.2-10.3, App. 48. Finally, the Contract provides for survival of all representations and warranties until this Contract has been terminated, and provides for termination only upon mutual, written agreement, which has not occurred. Contract, 12.9, 12.12, App. 50-51. Any fair reading of the regulations in question, which specifically authorized not only the Contract but “repayment requirements or other penalties,” provides ample affirmative authority for the agency to enforce its contractual rights during the still-extant life of the Contract. 261 Iowa Adm. Code 36.5(2) (Oct 8, 2008), R. 1372, App. 861.

Ghost Player has cited to no authority under Iowa law to support the notion that there is some separate principle, outside of the res judicata

analysis, that would deprive the Agency from exercising its authority under a contract that Ghost Player has conceded it had the authority to administer. Put simply, however labeled (e.g. no collateral attacks, lack of authority, prohibited by law, or res judicata), Ghost Player's argument is in substance a res judicata argument. Ghost Player has not proved the elements of res judicata.

CONCLUSION

For all the foregoing reasons, and the reasons stated in its original Proof Brief, the Agency respectfully requests that the Court reverse the decision of the district court and reinstate the Agency's decision.

CERTIFICATE OF COMPLIANCE

This brief complies with the type face requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font size and contains 3,670 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ David L.D. Faith, II
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Assistant Attorney General

CERTIFICATE OF SERVICE

I, David L.D. Faith, II, hereby certify that on the 7th day of August, 2017, I or a person acting on my behalf did serve Appellant Iowa Department of Economic Development's Final Reply Brief on all other parties to this appeal by EDMS to the respective counsel for said parties:

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CERTIFICATE OF FILING

I, David L.D. Faith, II, hereby certify that on the 7th day of August, 2017, I or a person acting on my behalf filed Appellant Iowa Department of Economic Development's Final Reply Brief with the Clerk of the Iowa Supreme Court by EDMS.

/s/ David L.D. Faith, II
DAVID L.D. FAITH, II
Assistant Attorney General